

No. 50333-6- II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

SVETLANA KUDINA

Appellant,

vs.

CITIMORTGAGE, INC., a foreign (non-Washington incorporated) entity;
QUALITY LOAN SERVICE CORPORATION, a Washington corporation;
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,
a foreign (non-Washington) incorporated entity; and DOES 1-10,
Respondents

BRIEF OF RESPONDENT
QUALITY LOAN SERVICE CORPORATION OF WASHINGTON

Kathy Shakibi, WSBA No. 49381
MCCARTHY HOLTHUS, LLP
Attorneys for Respondent,
Quality Loan Service Corporation of
Washington
108 1st Ave. S, Suite 300
Seattle, WA 98104
(206) 596-4861

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	RESPONSE TO ASSIGNMENTS OF ERROR	2
III.	STATEMENT OF THE CASE	3
IV.	ARGUMENT	3
	A. Standard of Review	3
	B. Quality’s Motion to Dismiss the Amended Complaint in the Superior Court	4
	C. The Limited Scope of Ms. Kudina’s Assignments of Error	5
	D. Quality Joins in CMI’s Response Brief to the Extent That CMI’s Brief Sets Forth How The 2010 Litigation Precludes Ms. Kudina From Re-Litigating Her Claims	6
V.	CONCLUSION	7

TABLE OF AUTHORITIES

Case Law

<i>Bravo v. Dolsen Cos.</i> , 125 Wn.2d 745 (1995)	4
<i>FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.</i> , 180 Wn.2d 954, 962 (2014)	3
<i>Gorman v. Garlock, Inc.</i> , 155 Wn.2d 198, 215 (2005)	4
<i>Haberman v. Wash.Pub. Power Supply Sys.</i> , 109 Wn.2d 107 (1987)	4
<i>Kinney v. Cook</i> , 159 Wn.2d 837, 842 (2007)	4
<i>Nast v. Michels</i> , 107 Wn.2d 300, 308 (1986)	4
<i>State v. Ngo Tho Huynh</i> , 107 Wn.App. 68 (2001)	4
<i>State v. Costich</i> , 152 Wn.2d 463, 477 (2004)	4
<i>Todric Corp. v. Dep’t of Revenue</i> , 109 Wn.App. 785 (2002)	3

Civil Rules

CR 12(b)(6)	3, 4
-------------------	------

Secondary Source

Black’s Law Dictionary, Garner, Thomson Reuters (9 th Ed. 2009)	4
--	---

I. INTRODUCTION

Quality Loan Service Corporation of Washington (“Quality”), a defendant in Clark County Superior Court Case No. 16-2-05554-4, and a Respondent in the Court of Appeals, hereby submits this Response to Opening Brief of Appellant, Svetlana Kudina (“Ms. Kudina”). This appeal arises from Ms. Kudina’s attempts to stop the foreclosure on her property. There have been two rounds of litigation to stop the foreclosure. The first round of litigation started in December 2010 and culminated with an appellate ruling in 2014. The second round of litigation started in 2016, and is now before this Court on appeal.

II. RESPONSE TO ASSIGNMENTS OF ERROR

Ms. Kudina presents for the Court’s review an Assignment of Error with two sub-parts and two issues, stated verbatim as follows:

“A. The trial court erred in dismissing the claims asserted in the Amended Complaint

1. Improper Application of Res Judicata
2. Improper Application of Collateral Estoppel

B. Issues Pertaining to Assignments of Error

1. If all of the “identity” elements of either *res judicata* or collateral estoppel are not satisfied, is dismissal proper?
2. If the claims in an Amended Complaint are different than those identified in prior *pro se* litigation, can the elements for either *res judicata* or collateral estoppel be satisfied to justify dismissal of a Complaint?” Brief of Appellant at 5.

Quality does not assign any error to the Clark County Superior Court’s ruling on Quality’s Motion to Dismiss.

III. STATEMENT OF THE CASE

The mortgage loan which is the subject of the two litigations originated in April 2008, when Ms. Kudina purchased the property located at 13703 Northwest 43rd Avenue, Vancouver, WA (“Property”) from her parents. CP 81. The purchase of the

Property was financed with a mortgage loan. CP 81, 82. On or about April 18, 2008, Ms. Kudina executed a promissory note in favor of original lender E-Loan, Inc. CP 104, 110, 169-171, 215.¹ The promissory note is secured with a Deed of Trust recorded against the Property. CP 200-211, 215, 216.

The following year, in 2009, Ms. Kudina defaulted on her mortgage loan and in October 2009, CitiMortgage, Inc., (“CMI”) sent Ms. Kudina a Notice of Default, followed by subsequent communications regarding the default. CP 87. In May 2010, Ms. Kudina filed for Chapter 7 bankruptcy protection. CP 384-429. In August 2010, Ms. Kudina obtained a discharge, and in September 2010, her bankruptcy case was terminated. CP 87, 244, 384.

In December 2010, Ms. Kudina filed her first lawsuit against CMI in the U.S District Court for the Western District of Washington, in a case entitled Svetlana Kudina v. CitiMortgage, Inc., U.S.D.C. Case No. 3:10-cv-05887-RBL (2010 Litigation). CP 226, 240-243. In January 2011, Ms. Kudina amended her complaint. CP 252-256. In the 2010 Litigation, Ms. Kudina sought to enjoin the foreclosure on her Property among other claims. CP 227, 230.

Thereafter, Ms. Kudina and CMI filed cross Motions for Summary Judgment. CP 80-101, 102-109, 257-264, 286-307. In October 2011, the District court ruled on the two Motions for Summary Judgment, and denied Ms. Kudina’s Motion and granted CMI’s Motion for Summary Judgment. CP 131-135, 434-438. In the 2010 Litigation, judgment was entered in favor of CMI. CP 136, 439.

¹ A copy of the promissory note is at CP 169-171.

Subsequently, Ms. Kudina appealed the District Court's ruling to the 9th Circuit. CP 440. The 9th Circuit appeal culminated in a ruling in March 2014, affirming the trial court's ruling, and holding that the District Court properly denied Ms. Kudina's motion for summary judgment and properly granted CMI's motion for summary judgment. CP 137-139, 442-444.

In August 2016, Ms. Kudina, facing a scheduled foreclosure sale date of August 26, 2016, commenced a second round of litigation against CMI (2016 Litigation), once again seeking an injunction to stop the foreclosure sale on her Property, among other claims. CP 3-16. In the 2016 Litigation, Ms. Kudina named Quality as a defendant in the action. The operative pleading is the (First) Amended Complaint, which Ms. Kudina filed in September 2016. CP 148-167.

Quality is the successor foreclosure trustee under the Deed of Trust. On August 28, 2015, an Appointment of Successor Trustee was recorded in Clark County records whereby CMI appointed Quality as the successor trustee. CP 213-214, 216. Thereafter, Quality caused to be recorded a Notice of Sale, scheduling a sale date of August 26, 2016. CP 216. The foreclosure sale has since been cancelled. CP 141, 152, 216. Foreclosure sale on the Property has not completed and no sale is pending. CP 216.

IV. ARGUMENT

A. Standard of Review

A trial court's ruling on a motion to dismiss under CR 12(b)(6) is reviewed de novo. *Todric Corp. v. Dep't of Revenue*, 109 Wn.App. 785 (2002); *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962 (2014);

Kinney v. Cook, 159 Wn.2d 837, 842 (2007). Per Black’s law dictionary, a de novo hearing is reviewing a court’s decision anew, giving no deference to a lower court’s findings, as if the original hearing had not taken place. Garner, Thomson Reuters (9th Ed.,2009).

An appellate court may affirm a trial court ruling on any ground that the record supports. *State v. Ngo Tho Huynh*, 107 Wn.App.68 (2001); *Nast v. Michels*, 107 Wn.2d 300, 308 (1986); *State v. Costich*, 152 Wn.2d 463, 477 (2004).

“Dismissal under CR 12(b)(6) is appropriate in those cases where the plaintiff cannot prove any set of facts consistent with the complaint that would entitle the plaintiff to relief.” *Bravo v. Dolsen Cos.*, 125 Wn.2d 745 (1995). A complaint’s legal conclusions are not required to be accepted on appeal. *Haberman v. Wash.Pub. Power Supply Sys.*, 109 Wn.2d 107 (1987). If a plaintiff’s claim remains legally insufficient even under his or her proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate. *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215 (2005).

B. Quality’s Motion to Dismiss the Amended Complaint in the Superior Court.

In the 2016 Litigation, Quality filed a Motion to Dismiss the (First) Amended Complaint based on Civil Rule 12(b)(6), for failure to state a claim upon which relief may be granted. CP 215-222. Accompanying the Motion to Dismiss was a Request for Judicial Notice of publicly recorded documents. CP 197-214.

Additionally, Quality “joined in” co-defendant and co-respondent, CMI’s Motion to Dismiss, to the extent that Ms. Kudina’s claims were precluded and barred by the prior 2010 Litigation (claim preclusion and res judicata). CP 222. Because Quality had partially joined in CMI’s Motion to Dismiss, Quality scheduled its Motion to

Dismiss to be heard at the same time as CMI's Motion to Dismiss, both of which were initially scheduled to be heard on November 9, 2016. CP 195-196, 223.

On October 31, 2016, Ms. Kudina caused to be filed "PLAINTIFF'S RESPONSE TO DEFENDANT CITIMORTGAGE INC.'s MOTION TO DISMISS UNDER ER CR 12(B)*6)." CP 446-458. As the title as well as the text of the pleading indicates, Ms. Kudina filed a response/opposition to CMI's Motion to Dismiss only.

Ms. Kudina additionally requested a few continuances of the Motion to Dismiss hearings. CP 471-473, 475-513, 515-520, 532-533. The hearings on the motions finally went forward on February 7, 2017. Despite having had approximately four months to prepare and file an Opposition to Quality's Motion to Dismiss, Ms. Kudina never filed an Opposition to Quality's Motion, even though Quality's Motion set forth grounds for dismissal, in addition to res judicata and claim preclusion. CP 534.

At the February 7, 2017, hearing on the two motions, the Superior Court took the matter under submission. CP 534-535. On April 21, 2017, the Superior Court issued one Order granting both CMI and Quality's Motions to Dismiss. The Superior Court ruled that Ms. Kudina was precluded by the prior 2010 Litigation from re-litigating her claims. CP 536-537. Ms. Kudina followed with an appeal that is before this Court. CP 538.

C. The Limited Scope of Ms. Kudina's Assignments of Error.

With respect to Quality, Ms. Kudina has appealed an unopposed motion since Ms. Kudina never filed an opposition to Quality's Motion to Dismiss. CP 534. In its Motion, Quality did not rely on res judicata and claim preclusion concepts alone to defeat Ms. Kudina's (First) Amended Complaint. Quality's Motion to Dismiss

devoted about seven pages to arguing the lack of merit of Ms. Kudina's claims. CP 215-222. Ms. Kudina did not address Quality's lack of merit arguments and did not file an opposition to Quality's Motion to Dismiss.

On appeal, Ms. Kudina's assignments of error is limited in scope to the "improper application of res judicata," and "improper application of collateral estoppel." Since the lack of merit portion of Quality's Motion to Dismiss has not been assigned as an error and is not before this Court for review, it would be improper for Quality to address that which has not been assigned as an error and is not on appeal.

D. Quality Joins in CMI's Response Brief to the Extent That CMI's Brief Sets Forth How The 2010 Litigation Precludes Ms. Kudina From Re-litigating Her Claims.

To the extent that the 2010 Litigation has claim preclusion and res judicata impact on Ms. Kudina's 2016 Litigation, Quality's Motion to Dismiss had joined in CMI's Motion to Dismiss. Although the trial court's ruling agreed that claim preclusion and res judicata applies and granted both CMI and Quality's motions, with respect to Quality, the trial court could just as well have granted Quality's Motion to Dismiss for lack of opposition, or for failure to address Quality's lack of merit arguments.

What is before this Court for review is the ostensible improper application of res judicata and claim preclusion. The record before this Court consists of relevant pleadings from approximately four years of prior litigation regarding Ms. Kudina's mortgage loan, during which certain findings were made by the District court and affirmed by the 9th Circuit. To the extent that prior courts have made

findings and issued rulings, Ms. Kudina cannot take inconsistent positions or ask this Court to overlook and disregard the impact of extensive prior litigation on the 2016 Litigation.

At the trial level Quality “joined in” CMI’s Motion to Dismiss, to the extent that CMI’s Motion to Dismiss fully briefed why and how the 2010 Litigation precluded the 2016 repetitious, albeit embellished, litigation. Once more, Quality’s Response Brief “joins in” CMI’s Response Brief, and the claim preclusion and res judicata arguments therein, as Quality believes that Ms. Kudina cannot re-litigate what has already been litigated.

V. CONCLUSION

The Superior Court properly granted Quality’s unopposed Motion to Dismiss the Amended Complaint. Quality respectfully asks this Court to affirm the Superior Court’s ruling, in light of the extensive 2010 Litigation, and the rulings made by the District Court and the 9th Circuit.

MCCARTHY HOLTHUS, LLP

Dated: September 21, 2017

/s/ Kathy Shakibi
Kathy Shakibi, WSBA #49381
Attorney for Respondent,
Quality Loan Service Corporation
Of Washington

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2017, I electronically filed the foregoing **Brief of Respondent, Quality Loan Service Corporation of Washington**, and this Certificate of Service, with the Clerk of the Court, using the Washington State Appellate Court's Portal for e-filing, which will serve electronic copies of such filing on the following attorneys of record:

James Wexler
2700 NW Pine Cone Dr Unit 314
Issaquah, WA 98027
wex@seanet.com
Attorney for Appellant, Svetlana Kudina

Scott Anders
Russell Garrett
Jordan Ramis PC
1499 SE Tech Center Pl. Suite 380
Vancouver, WA 98683
Scott.anders@jordanramis.com
Russ.garrett@jordanramis.com
Attorney for Respondents,
CitiMortgage, Inc., and Mortgage
Electronic Registration Systems, Inc.

And, I hereby certify that I caused service to be made, via U.S. Mail, first class postage prepaid, on the following Pro Hac Vice attorney:

Jeff Barnes
W.J. Barnes, P.A.
1515 North Federal Highway, Suite 300
Boca Raton, Florida 33432
Attorney for Appellant, Svetlana Kudina

Dated this 21st day of September, 2017

By: /s/ Kathy Shakibi
Kathy Shakibi, WSBA #49381
Attorney for Respondent,
Quality Loan Service
Corporation of Washington

MCCARTHY & HOLTHUS, LLP

September 21, 2017 - 4:07 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50333-6
Appellate Court Case Title: Svetlana Kudina, Appellant v CitiMortgage, Inc., et al, Respondents
Superior Court Case Number: 16-2-05554-4

The following documents have been uploaded:

- 0-503336_Briefs_20170921155846D2236427_9214.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Kudina Response Brief 9-19-2017.pdf

A copy of the uploaded files will be sent to:

- litparalegal@jordanramis.com
- russ.garrett@jordanramis.com
- scott.anders@jordanramis.com
- wex@seanet.com

Comments:

Sender Name: Katayoun Shakibi - Email: Spot95@msn.com
Address:
108 1ST AVE S STE 300
SEATTLE, WA, 98104-2104
Phone: 206-596-4856

Note: The Filing Id is 20170921155846D2236427